

**REPUBLIC OF TRINIDAD**

**IN THE HIGH COURT OF JUSTICE**

NO. S 703 of 1998

**BETWEEN**

**GIBRAJ SANKAR**

**PLAINTIFF**

**AND**

**MAHASE SOOKHAI**

**B. & L. INSURANCE**

**DEFENDANTS**

**Before the Honorable Justice M. Dean-Armorer**

**Appearances:**

Mr. Johnatty and Mr. George Ojar for the Plaintiff

Ms. Nisha Persad for the first Defendant

Mr. Sean Roopnarine for the second Defendant

**DATE DELIVERED : 16<sup>TH</sup> December , 2002.**

# JUDGMENT

## Introduction

By this action the Plaintiff claimed damages for personal injuries by a Generally Indorsed Writ of Summons dated the 23<sup>rd</sup> July, 1999. It has not been disputed that the first Defendant, Mahase Sookhai, was the owner of the garbage truck, registration number TAP 7753. The Plaintiff, Gibraj Sankar, was employed by the first Defendant as a garbage collector. On the 11<sup>th</sup> of June, 1996, the Plaintiff was on the footboard of the truck, which was being driven by Michael Mathura, another employee of the first Defendant. In negotiating a corner, the driver managed the truck in such a way that the Plaintiff was pressed against a wall and suffered personal injuries.

The first Defendant failed to deliver a defence and the Plaintiff took up judgment in default thereof. The only issue outstanding between the Plaintiff and the first Defendant relates to the appropriate quantum of damages payable by the Defendant to the Plaintiff.

The second Defendant, the B. & L. Insurance Co. Ltd. was sued as the insurer of the first Defendant. The second Defendant delivered a Defence on the 5<sup>th</sup> February, 1999. In its Defence, the second Defendant contends *inter alia* that the claim of the Plaintiff was not maintainable against the second Defendant and that accident, which is the subject of these proceedings, was not covered by the relevant policy of insurance. The Plaintiff joined issue with the Second Defendant in its Reply filed on the 4<sup>th</sup> November, 1999.

## **The Evidence**

No witnesses were called for either Defendant. The Court heard the *viva voce* evidence of five (5) witnesses for the Plaintiff, namely:

- The Plaintiff himself
- The Plaintiff's Doctor, Dr. Hassan Khan
- The first Defendant, Mahase Sookhai
- Ms. Kamini Kalloo, who was the common law wife of the Plaintiff

### **Evidence of the Plaintiff**

The Plaintiff told the Court that he was born on the 8<sup>th</sup> of October, 1954 and that he had been involved in an accident on the 11<sup>th</sup> June, 1996. He testified that he was on the footboard of the garbage truck, registration number TAP 7753, which was taking him to the "Corporation office", Couva along Williams Street. He testified further that the truck was traveling in a Southerly direction and began taking a corner, at which another vehicle was parked. The Plaintiff told this Court that the back of the truck touched a brick wall and pressed his lower body against the wall.

The Plaintiff testified that he lost consciousness for two (2) days. He stated that he had been taken by bystanders from Couva to the Port of Spain General Hospital. He was warded firstly at the Intensive Care Unit and then at Ward 14 of the Port of Spain General Hospital. The Plaintiff told the Court that he spent two (2) months at the Port of Spain General Hospital, before he was sent home. He stated that he is, at present, an out-patient of the Port of Spain General Hospital, that he had undergone surgery to remove his urinary tract, but that the surgery collapsed. He stated that at present, he is awaiting corrective surgery and that it is necessary for him to attend the out-patient's clinic once every three months to change his "*catheter*".

The Plaintiff gave evidence concerning his family life. He stated that he had a common law wife whose name is Kamini Kalloo. He stated further that he was the father of two girls, one of whom was married and the other, who was 16 years old and who lived at his home and attended Chaguanas Senior Secondary School. He told the Court that his “wife” did not work, but that he maintained himself by payments from the National Insurance Scheme and the Social Welfare Department.

The Plaintiff gave evidence of his injuries. He testified that his hip bone was damaged and that he could not sit for long periods. There was however no medical evidence to support this aspect of his testimony. He stated that he would mostly lie on his back and could not sit for more than one and a half (1½) hours at a time or stand for more than fifteen (15) to twenty (20) minutes. He stated that he was incapable of lying ventrally and needed to lie on his back at all times and that the presence of the catheter was a source of pain in his abdomen whenever he moved.

The Plaintiff gave evidence in support of his claim for loss of amenities. He testified that prior to the accident, he played wind-ball cricket and beach football. He had also enjoyed chutney singing, fishing and making a lime at the pool. He stated that he could no longer do these things.

The Plaintiff gave evidence concerning his employment prior to the accident. He stated that he had worked for eight (8) years or more. He was paid in cash by Mr. Mahase Sookhai, who is the first Defendant in this matter. He testified that he worked five (5) days per week and received a weekly cash payment of \$250.00. He stated that he had been sexually active prior to the accident, but was no longer so.

The Plaintiff gave evidence of his medical and related expenses. He was not permitted to adduce evidence as to the purchase of colostomy bags, since this item had not been specially pleaded in his Amended Statement of Claim. The Plaintiff testified however that the cost of his travel to and from the hospital was \$100.00 per trip.

Cross –examination of the Plaintiff

The Plaintiff was cross-examined by Mr. Roopnarine learned Counsel for the second Defendant. In cross-examination, the Plaintiff claimed that a deduction of \$7.45 per week was made from his salary for the payment of N.I.S. contributions. This was however contradicted by the first Defendant. The Plaintiff also admitted that he received monthly injury benefits of \$563.00

The Plaintiff was also cross-examined as to his purpose on the truck at the time of the accident. He agreed with learned counsel for the Defendant that he was employed as a garbage-man and that on the day of the accident he had been working as a garbage-man. He admitted further that, as a garbage-man, he picked up garbage and climbed onto the back of the truck. The Plaintiff added that the truck transports him to another destination. He admitted that the truck was there to transport him. When asked whether he would be able to go to work without the truck, he responded by saying that the owner would send another truck. The Plaintiff agreed that without a truck, he could not work.

Evidence of Dr. Hassan Khan

Dr. Hassan Khan gave evidence to establish himself as a medical doctor. He identified the Plaintiff as having been one of his patients and stated that he had attended to the Plaintiff in January, 1998. Dr. Khan stated further that he had given the Plaintiff social welfare forms and a medical report. The Medical Report was tendered in evidence and marked “H.K.1”. Dr. Khan, a urologist, gave evidence that the Plaintiff had suffered a “rupture of the prostatic urethra”. He explained that the passage of urine from the bladder goes through the urethra, which, when ruptured becomes discontinuous.

Dr. Khan testified that he conducted an operation on the Plaintiff in the year 2000 in an attempt at major re-construction of the “discontinuous and strictured urethra” by using a buccal/mucoid graft.

Dr. Khan was asked to explain the second finding appearing on the Report, that is to say, a “*retro peritoneal tear of the rectum*” and told the Court that the bladder, which is behind the rectum, had also become torn.

Dr. Khan, when asked about the Plaintiff’s sexual activity stated that there was no way of assessing a complaint of sexual dysfunction and that as a doctor he simply had to accept the word of the patient.

Dr. Khan, when asked about the Plaintiff’s alleged inability to work, stated that in the case of crush injuries “the impact is very severe”, because the rectum has been damaged. The learned Doctor stated further:

*“From my assessment it would be difficult for Mr. Sankar to find employment and to be able to do any form of manual labour....”*

When asked whether the Plaintiff would need further medical attention, Dr. Khan stated that the Plaintiff would need to have his surgery reviewed, initially every month and then every three months. Dr. Khan also told this Court that after the surgery in the year 2000, the graft worked, but that there was subsequent closure of the graft warranting further surgery. When asked how soon the Plaintiff would get surgery, Dr. Khan stated that cases are prioritized on a waiting list in the Urology Department and that reconstruction was third on the list, as priority is given to cancer and stone removal cases. Dr. Khan stated further that a substitute operation only is available locally in the private sector.

#### Cross-examination

Under cross-examination, it became clear that Dr. Khan felt himself capable of addressing the medical condition of the Plaintiff from a urological point of view, only.

He stated:

*“My management was confined to his urological problems...”*

Dr. Khan stated further that the Plaintiff may not have been fit for manual labour, but that he could do other kinds of work, which do not require physical activity.

Dr. Khan also testified that, from a urological point of view it would be difficult for the Plaintiff to attend the beach, river or social functions, because the catheter was likely to leak urine which had an abrasive effect on the skin.

Dr. Khan was asked about the substitute operation. He told the Court that by the substitute operation the catheter would be replaced and that the Plaintiff would be able to pass urine normally.

### **Evidence of Mahase Sookhai**

Mahase Sookhai, the first Defendant in these proceedings gave evidence on behalf of the Plaintiff. He testified that he knew the Plaintiff, who had worked with him for approximately 8 years.

The first Defendant testified further that the Plaintiff's last salary was \$250.00 and that he (the first Defendant) paid N.I.S. and Health Surcharge.

The first Defendant told the Court that the Plaintiff's hours of work had been 5.00 a.m. to 7 00- 8.00 a.m.

The first Defendant also stated that his employees received increases in salaries every 3 years.

*In Cross-examination*

Under cross-examination, the first Defendant admitted that he had to tender for contracts and that there was no guarantee that their tender for a contract would be successful.

The first Defendant also admitted that the increase which his employees received would be dependant on the price awarded for the contract.

The first Defendant stated however that even if the awarded contract price remained the same employees would receive an increase.

The first Defendant also told the Court of the assistance which he rendered to the Plaintiff following the accident. He told the Court that he continued paying the Plaintiff's salary until "*the Writ came*". He accepted in cross-examination that he received the Writ on the 15<sup>th</sup> January 1999. The first Defendant also told the Court that he rendered assistance to the Plaintiff in the hospital.

This witness was cross-examined as to the terms of employment of the Plaintiff. He stated that the Plaintiff received a flat salary of \$ 250.00 per week and that he, the first Defendant paid the amounts due as National Insurance and as Health Surcharge. He admitted that without a garbage truck, Mr. Sankar could not perform his duties. The first Defendant also admitted that the truck, in addition to picking up garbage also transports the Plaintiff from place to place. The first Defendant did not fully agree, however, that after collection of all garbage, the truck returns garbage collectors to their place of business. In this regard he stated:

*"Sometimes they drop off to do their personal business or another hustle..."*

The first Defendant was asked whether, at the time of the accident the Plaintiff was working as a garbage man for him. To this question the first Defendant answered

“yes and no”. His answer was repeated when it was put to him that Mr. Sankar was working as a garbage man for him when the accident occurred.

In re-examination, the first Defendant was asked to explain his “yes and no” answer. In explanation he said:

*“When the loaders finish work they don’t always come back with the truck.”*

The first Defendant stated further:

*“I have no control over him after they finish work. He will be on his own.”*

This witness was recalled at the end of submissions of Counsel. The certificate of insurance, which was issued to the first Defendant by B & L Insurance was tendered by consent and marked “M.S.I”.

### **Evidence of Kamini Kalloo**

Kamini Kalloo was the common law wife of the Plaintiff. She testified that on the 11<sup>th</sup> June 1996 she received a call between 8:00 a.m. and 8:30 a.m. She gave evidence that she left work immediately for the Port of Spain General Hospital and discovered upon arrival at her destination that the Plaintiff was undergoing surgery.

Ms. Kalloo also testified that following the accident she did not go back to work because she “*had to stay home to see about him*”.

She gave evidence, which was largely corroborative of the Plaintiff’s evidence, as to the length of his stay at the hospital.

Ms. Kalloo also gave evidence as to a change in the Plaintiff’s personality. She stated that he had been a “*nice*” person and that after the accident he became very

grumpy. She stated further that her present relationship with the Plaintiff was “*not so good at all*”. She stated further that they do not sleep together. Ms. Kalloo was asked why they did not sleep together. She answered this question by stating that the Plaintiff causes bed sheets to be soiled and that his sheets require changing at least three (3) times per night.

## **Submissions**

### **For the second Defendant**

Mr. Roopnarine for the second Defendant argued in the first place that the Statement of Claim sought no relief against the second Defendant and that such flaw was, pursuant to O.18 r.15, fatal to the Plaintiff’s case against the second Defendant.

Learned Counsel for the second Defendant argued further that the Plaintiff is not entitled to refer to a cause of action that is not in the Writ.

In the alternative, learned counsel for the second Defendant has argued that the Plaintiff is required to prove four (4) elements under s. 10 of the *Motor Vehicles and Road Traffic Act*, that is to say:

- The delivery of a certificate of insurance to the insured.
- The existence of a valid policy of insurance.
- That the risk as required to be covered by the policy was under s. 4 (1) (b).
- That the Insurance Company was given the required statutory notice.

Learned Counsel for the second Defendant referred to *Bullen and Leake's Precedents of Pleadings* in support of his submission that an express plea of notice was necessary where notice was a material fact.

Learned Counsel for the second Defendant referred to s. 4(2) of the *Motor Vehicles and Road Traffic Act*, and submitted that the injury to the Plaintiff had occurred out of and in the course of the Plaintiff's employment and that the injury is not thereby covered by s. 4 (1) (b) of the *Motor Vehicles and Road Traffic Act*. Learned Counsel for the second Defendant also referred to the case of *Van Dyke v. Fender* [1970] 2 All E.R. 335, as establishing the meaning of the term "*course of employment*".

He pointed to paragraph 5 of the Amended Statement of Claim argued that it would be a departure therefrom for the Plaintiff to argue that he was not working at the time of the accident.

*Learned Counsel for the first Defendant*

Learned Counsel for the first Defendant reminded the Court that there was no question of liability in respect of the Plaintiff's claim against the first Defendant, since judgment had been entered against the first Defendant in default of Defence.

In respect of an appropriate quantum of damages, learned counsel for the first Defendant commended the well-known case of *Cornillac v. St. Louis* to the Court. She argued that there was no evidence that the Plaintiff had sought to mitigate his damages by seeking alternative employment. Learned Counsel for the first Defendant submitted further that an appropriate multiplier was five (5) and an appropriate multiplicand was \$12,000.00 and pointed out that there was no evidence to suggest that the injury was permanent.

## **Facts and Issues**

There is no dispute that the Plaintiff had been injured on the day in question, while being transported at the back of the first Defendant's garbage truck. It has not been disputed that the truck was being driven by an employee of the first Defendant at the material time and that, at the material time the truck was on its way back to the Corporation Office in Couva.

The injuries alleged by the Plaintiff are also undisputed. It has not been disputed that the Plaintiff suffered injuries to his pelvic bones. Although there was no medical evidence to support this claim, there was no evidence to contradict the Plaintiff's claim. There was also no dispute that he became unconscious and had to be taken to the Port of Spain General Hospital where he underwent surgery and spent two (2) months.

It is also undisputed that the Plaintiff has lost the use (at least temporarily) of a normally functioning bladder and bowel and is compelled to use a catheter and colostomy bags for the expulsion of waste. It is also undisputed that he is incapable of standing and sitting for long periods.

His loss of amenities are also largely undisputed and the matters of fact that remain for the Court's consideration are centered initially on matters of pleading and secondly on the certificate and policy of insurance and whether the accident in question is covered thereby.

Accordingly the issues that arise for the Court's determination on the question of pleadings are:

- Whether the Plaintiff's failure to specify the relief claimed against the second Defendant in the Writ was fatal

- Whether it was necessary for the Plaintiff to plead that the certificate of insurance was delivered to the first Defendant.
- Whether it was necessary for the Plaintiff to plead that statutory notice had been given to the second Defendant.

Issues relating to the substance of the matter are:

- Whether the Plaintiff has conceded in his pleadings that at the time of the accident he had been acting in the course of his employment.
- If not whether, at the time of the accident the Plaintiff was acting in the course of his employment, so as to place the accident outside of the coverage of the insurance policy, as issued by the second Defendant
- Whether the Plaintiff gave to the second Defendant statutory notice of the action herein.
- Whether the Plaintiff failed to mitigate his losses
- Whether the Plaintiff earned a flat wage as deposed by the first Defendant
- What is an appropriate quantum of damages

## **Law:**

### **Points of Pleading**

#### 1. **Indorsement on Writ**

Learned Counsel for the second Defendant referred the Court to O. 6(2) of the Rules of the Supreme Court O. 6 r. 2 provides:

*“ 2. (1) Before a writ is issued it must be indorsed-with a statement of claim, or if the statement of claim is not indorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby;”*

#### 2. **Statement of Claim**

Learned Counsel also referred the Court to O. 18 r. 15(2) of the ***Rules of the Supreme Court*** in his submission that the Statement of Claim should be struck out as against the second Defendant. Order 18 r. 15(2) provides :

*“ 15. (2) A statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned, but, subject to that, a plaintiff may in his statement of claim alter, modify or extend any claim made by him in the indorsement of the writ without amending the indorsement.”*

3. The conjoint effect of O.6 r. 2 and O. 18 r. 15 of the ***Rules of the Supreme Court*** was considered by the Court of Appeal in the United Kingdom in the case of ***Sterman v E.W. & W.J. Moors Ltd. (a firm)*** [1970] 1 All ER 581. In that case the Plaintiff had

failed to specify the cause of action or the remedy which was being sought in the indorsement on the Writ. The Defendant entered an unconditional appearance and the Plaintiff filed and served a Statement of Claim which specified both the cause of action and the remedy.

An earlier application to the Master in Chambers to amend the Writ was refused on the ground that the defect in the Writ would be cured by the filing of a Statement of Claim. On this occasion the Defendant took the point that the Statement of Claim had failed to comply with O. 18 r. 15 (2) since it contained a claim in respect of the cause of action which had not been mentioned in the writ. The Plaintiff sought and obtained leave to amend the Statement of Claim.

The Court has found the learning in this case to be both useful and illuminating. Lord Denning considered at p. 584d of the Report whether the indorsement on the Writ was defective. The learned Master of the Rolls expressed the view that the Writ was defective in so far as it omitted to state the cause of action. At p. 584d, Lord Denning is reported to have said:

*“The indorsement should state the nature of the claim made and the relief or remedy required.....At any rate even if it is not necessary to state a cause of action it is very desirable to do so .....*”

The learned Master of the Rolls then elucidated his approach of the matter by saying:

*“I am prepared .....to approach this case on the footing that the writ did not comply with the rule.”*

Having said that, Lord Denning proceeded to hold that the defect in the Writ was a mere irregularity and was caused by the filing of the Statement of Claim.

Lord Denning considered the effect of O. 18 r. 15(2), *Rules of the Supreme Court* and in particular whether the Statement of Claim was defective. Lord Denning said at p. 584f:

*“Although the irregularity in the writ was waived, nevertheless the statement of claim may be bad. So I turn to the second question. It is whether the statement of claim was bad or not. It seems pretty plain that it did not comply with the new RSC O. 18, r. 15(2). It could not possibly comply with it because there was not cause of action mentioned in the writ. Nevertheless, this failure to comply was again only an irregularity. It was not a ground for striking out the statement of claim, but only for setting it aside. And then only if the court thought it just to do so, see RSC Ord. 2, r. 1(2). I do not think that it would be just to set it aside”.*

And at p. 585a:

*“So I would for myself have been content to treat the defects in the writ and statement of claim as irregularities which could be overlooked. I would tell the parties to get on with the substance of the case without more ado. But I can see the force of the argument which says that the new RSC Ord. 18, r. 15(2) should be complied with; ....”*

Lord Denning concluded his judgment by ruling that:

*“Once amended, there will be not difficulty whatsoever in allowing the statement of claim to stand. It will fully satisfy RSC Ord. 18, r. 15(2).”*

Lord Justice Salmon agreed with the learned Master of the Rolls. The court found his analysis of O.18 r. 15 to be insightful:

*“It seems to me, although I am expressing no concluded view on the point, that the provisions of RSC Ord. 18, r. 15, preclude the plaintiff from including any*

*cause of action in his statement of claim which is not mentioned in the writ. Accordingly, I am inclined to think that Bridge J was right when, in the absence of any amendment to the writ, he ordered the statement of claim to be struck out.”*

4. The failure of the litigant to comply with O. 18 r. 15(2) of the **Rules of the Supreme Court** has been classified as an irregularity that can be cured by a waiver by the other party. In this regard the Court wishes to refer to **Brickfield Properties Ltd. v. Newton** [1971] 3 All ER 328. In that case, the British Court of Appeal held that an O. 18 r. 15(2) irregularity may be cured by the effect of O.2 r. 2 which provides:

*“An application to set aside for irregularity...any document ...shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.”*

In **Brickfield Properties**, there was no waiver because the Defendant, in its Defence, left open the question of the irregularity.

The Court also wishes to refer to HCA #S-5/1988, **NCB v. Maharaj**. In this case the learned Justice Persad-Maharaj reiterated the rule that applications to strike pleadings ought to be made promptly. In the instant case, the second Defendant must have been aware of the irregularity in the Statement of Claim, before having taken the fresh step of serving its Defence. This Court is therefore of the view that by filing and serving its Defence the second Defendant waived any irregularity in the Statement of Claim.

### **Points of Substance**

#### **Whether the Plaintiff was injured in the course of his employment**

Learned Counsel for the second defendant referred to and relied on the case of **Vandyke v Ferdel & Anor.**, [1970] All E.R. 335 in which Lord Denning considered

whether an employee who was injured while being transported to or from his place of work suffered an injury arising out of or in the course of his employment. At p. 340C, Lord Denning formulated the following test:

*“The two leading case, most opposite for present purposes are St. Helen’s Colliery Co. Ltd. v. Hewitson and Weaver v. Tredegar. They show to my mind quite conclusively that when a man is going to or coming from work along a public road as a passenger in a vehicle provided by his employer, he is not then in the course of his employment unless he is obliged by the terms of his employment to travel in that vehicle. It is not enough that he should have the right to travel in that vehicle, or be permitted to travel in it. He must have an obligation to travel in it. Else he is not in the course of his employment...”*

This case was also cited and relied upon in the case of ***Bushell v. Chefettes Restaurant Ltd.*** (1978) 31 W.I.R.79 which was relied upon by learned Counsel for the Plaintiff.

### **Damages**

1. It is well established that the relevant heads of damage in personal injury cases are authoritively set out by Sir Hugh Wooding, C.J. in **Cornillac v St. Louis**. They are:

- The nature and extent of the injury sustained.
- The pain and suffering endured.
- The loss of amenities suffered.
- The effect on pecuniary prospects.

2. In the *Cornillac v. St Louis*, the learned C.J. referred to and quoted from the case of *Transport Commissioner v Gourley* [1956] A.C. at p. 206 where Lord Goddard identified the two classes of damages awardable in personal injury matters.

*“In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damages, which has to be pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of the trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future.”*

3. The decision of the Court of Appeal in the case of Theophilus *Persad and Capital Insurance Company v Peter Seepersad* was delivered on the 28<sup>th</sup> February, 2002. The Court is bound by the learning in this decision and has also found it to be illuminating in respect of the issues arising in the case before the Court. The learned Justice of Appeal Kangaloo cited the categories identified in *Cornillac v St. Louis* and referred, at page 8 of 19 of his judgment to the case of *Selvaragen v U.W.I.* (1983) 1 WIR 824 as authority for the proposition that awards for general damages for pain and suffering and loss of amenities must be in keeping with the trend of local awards for similar injuries.

4. In the case before this Court, learned counsel referred to two local cases namely the decision of Master Paray Durity in *John Bacchus v. Jack & Lewis Electrical Appliances Centre Ltd.* HCA No. T99 of 1998/1792 of 1998. In *Bacchus*, the Plaintiff had sustained injuries to his right thigh, ankle and had suffered a fractured pelvis. The learned Master expressed the opinion that an award of \$210,000.00 as general damages was fair and reasonable. *Bacchus* is however slightly different from the instant case where evidence has been given of disabled bowel and bladder functions as a result of the injury.

5. The Court was also referred to the case of *Damien Walker v Ramkhalawan* HCA #1544/95 and found this case to be factually closer to the present case in that the injuries sustained in *Walker* also led to a loss of bladder and bowel control. This case is however distinguishable from *Walker*, where the victim of the accident became permanently disabled, wheel chair dependant and a paraplegic.

In *Walker* damages for pain and suffering were agreed at \$250,000.00. This award excluded the award for future loss of earning.

6. The Court considered the effect of the *Motor vehicles (Third Party Risks) Act* Ch. 48:51 which provides that a policy of insurance shall not be required to cover bodily injury to a person in the employ of the insured and whose bodily injury arose out of and in the course of his employment. By contrast the *Motor vehicles (Third Party Risks) (Amendment) Act* No. 38 of 1996 amends the original Act by inserting *inter alia* a provision that prohibits a policy from restricting liability. Section 5 (e) of the amending Act requires the following insertion after subsection 4:

*“4(a) in the case of death, bodily injury or damage to property a policy of insurance shall not contain any provision that restricts liability in respect of any portion of a claim by any one person arising out of the use of a motor vehicle on a public road.”*

7. The Court considered whether the amendment to the *Motor vehicles (Third Party Risks) (Amendment) Act* No. 38 of 1996 prohibited the effectiveness of the exclusion clause. In order to resolve this issue the Court had regard to the respective dates of the policy and of the 1996 amendment. The period of insurance stated in the policy was from the 4<sup>th</sup> June, 1996 to 3<sup>rd</sup> December, 1996. The *Motor vehicles (Third Party Risks) (Amendment) Act* became effective by proclamation on the 1<sup>st</sup> June, 1998. It was therefore permissible for the second Defendant to exclude liability in the Policy for employees.

### **Application of law to facts**

1. The first issue which presents itself for the Courts resolution in this matter is whether the second Defendant is protected from liability by the exclusion clause in the policy.
2. The policy of insurance was tendered in evidence by consent as ‘*MSI*’. There could be no dispute, that the policy expressly provides that the second Defendant would not be liable in respect of death or bodily injury to any persons in the employment of the insured arising out of or in the course of such employment.
3. The test of whether a passenger is in the course of his employment depends on whether he is obligated to be in the vehicle at the relevant time. It appears however that the issue of the Plaintiff’s obligation does not arise on the pleadings.
4. At paragraph 5 of the Amended Statement of Claim, the Plaintiff pleads that on the day in question he was “*working*” as a garbage collector. This paragraph has been admitted at paragraph 5 of the Defence. No issue therefore arises for the Court’s resolution. There has been no suggestion on behalf of the Plaintiff that, at the time of the accident, he was merely taking a ride on the garbage truck and that he had no obligation to do so. The plain meaning which must be ascribed to paragraph 5 of the Amended Statement of Claim is that at the material time on the 11<sup>th</sup> June 1996, the Plaintiff was in the course of his employment.
5. The Plaintiff had yet another opportunity to canvass the issue of the Plaintiff’s obligation to ride on the truck. By paragraph 3 of the Defence, the second Defendant referred to the exclusion clause. At paragraph 4, the second Defendant indicated its intention to contend at the trial that the injury to the Plaintiff occurred during the course of the Plaintiff’s employment and is not covered by the policy.

6. The Plaintiff met this plea in his Reply by merely stating an intention to prove at the trial that the injuries sustained were caused by a vehicular accident.
7. Paragraph 3 of the Reply, in my respectful view, does not assist the Plaintiff, since there is no contention that the injuries were caused by a motor vehicular accident. The Plaintiff, in the Reply, has not joined issue with the second Defendant that, at the time of the accident, the Plaintiff was in the course of his employment.
8. It is therefore the view of this Court that on the pleadings alone, the Plaintiff has himself averred that he was working at the time of the accident and has failed to plead anything to suggest that at the time of the accident, his presence on the truck was voluntary and beyond the scope of his employment.
9. Although, it is not necessary to proceed beyond the pleadings, the Court has observed that even in his evidence, the Plaintiff has not suggested that at the time of the accident he was not obligated to travel on the truck. In cross-examination the first Defendant testified that garbage collectors are free to leave the truck when the day's garbage is all collected. It was however beyond his personal knowledge whether the accident occurred after the Plaintiff had completed his day's work. It has therefore remained unanswered and a mystery to this Court, whether at the time of this very unfortunate accident, the Plaintiff had completed the exercise of garbage collection.
10. This issue must therefore regrettably be resolved in favour of the first Defendant, to whom no liability can be attached in these proceedings.

Damages

11. The first Defendant reacted with highly commendable compassion. The Court recognizes that notwithstanding the fact that the 1<sup>st</sup> Defendant is liable to pay damages to the Plaintiff this very tragic accident was not the fault of the first Defendant but was that of his driver, for whose actions the first Defendant is vicariously liable.
12. By the learning in *Transport Commissioner v Gourley* (supra), the award of general damages covers the heads of pain and suffering; loss of amenities and future loss of earnings. In assessing general damages, the Court has taken into account the fact that gifts were given by the first Defendant to the Plaintiff.
13. There could be no doubt that the Plaintiff in this case endured and continues to endure great pain and suffering as a result of the motor vehicular accident on the 11<sup>th</sup> June, 1996. By the Plaintiff's evidence, he was "squeezed" against a wall by a moving garbage truck. He became unconscious immediately, spent two days in the intensive care unit and two months at Ward 14 of the Port of Spain General Hospital. The Plaintiff still experiences pain by the presence of a catheter in his abdomen. The Court has also accepted his testimony that he is incapable of standing or sitting for long periods.
14. He has given evidence of a loss of amenities, meaning his inability following the accident to participate in recreational cricket; beach and river limes; chutney singing and to be sexually active.
15. At the date of the trial this Plaintiff was forty-eight (48) years old. The Court accepts the evidence of the first Defendant that the Plaintiff had been in receipt of a flat wage of \$250 per week or \$1,000 per month. It is estimated that his working life could have extended to age sixty (60) and that the Plaintiff may have enjoyed twelve (12) years of his working life if the accident had not occurred.

16. Any multiplier should take account of the vagaries of life in addition to the possibility that the Plaintiff might eventually be cured by corrective surgery. This Court is of the view that a multiplier of five (5) is appropriate, placing the award for future loss of earnings at:  $\$250.00 \times 4 \times 12 \times 5 = 60,000.00$
17. In assessing general damages the court is guided by the case of *Walker*. The Plaintiff in this case should receive a lower award because his injuries are not as severe. Moreover there is a possibility the Plaintiff's recovery by surgery from his incontinence. No evidence has been led to suggest that there is permanent disability. The Court is therefore of the view that an estimate of close to one half ( $\frac{1}{2}$ ) that of the award in *Walker* is reasonable i.e. \$110,000.00.
18. In respect of the Plaintiff's claims for special damages, the claim for traveling has been agreed at \$2,650.00. In respect of loss of earnings, from the date of the accident to the date of the trial, the Court has observed that the first Defendant continued to pay the Defendant's salary for some eighteen (18) months following the accident. Loss of earnings stand to be computed not from the date of the accident but from the date of the Writ, when the first Defendant discontinued the payment of the Plaintiff's salary. Under this head therefore the Plaintiff is entitled to \$1,000.00 per month from the beginning of 1998 to the end of 2002, i.e.  $\$1000 \times 12 \times 5 = 60,000.00$ .

**The Order :**

The awards are as follows:

1. General Damages for pain and suffering and loss of amenities: \$110,000 with interest at the rate of 6% per annum from the date of service of the Writ of Summons to the 16<sup>th</sup> of June, 2000 and thereafter at the relevant statutory rate.

2. Damages for future loss of earnings in the sum of 60,000.00. This sum does not attract interest.
- 3 Special Damages in the sum of \$62,600 together with interest at the rate of 6 % per annum. Claims for damage to clothing are refused because they have not been specially proved.
4. The Plaintiff to pay to the costs of the second Defendant. There is no order as to costs as between the Plaintiff and the first Defendant.

**Mira Dean-Armorer**  
**Judge**